

K.B.I. Security Services, Inc. and International Union, United Plant Guard Workers of America (UPGWA). Cases 34-CA-6495 and 34-CA-6667

January 8, 1997

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND HIGGINS

On August 9, 1995, the National Labor Relations Board issued a Decision and Order in this proceeding. The decision, reported at 318 NLRB 268, affirmed an administrative law judge's finding that the Respondent had violated Section 8(a)(3) and (1) of the Act by failing to recall security guards Orlando Febus and Hector Rosenthal from layoff. To remedy this violation, the Board ordered the Respondent to reinstate Febus and Rosenthal and to make them whole for any loss of earnings and benefits suffered as the result of the Respondent's discrimination against them.

Subsequently, the Respondent petitioned the United States Court of Appeals for the Second Circuit for review of the Board's Decision and Order. The Board cross-petitioned for enforcement of its Order. On July 19, 1996, the court issued a decision declining to enforce the order requiring reinstatement with backpay of Febus and Rosenthal. Noting record evidence and statements by the judge in an unpublished order indicating that one or both of the discriminatees may have engaged in theft on the job, the court remanded this case to the Board

for a further determination as to whether it is an appropriate remedy under the circumstances of this case to reinstate Febus and Rosenthal. In fashioning an appropriate remedy on remand, the Board has the authority and duty to consider all evidence and testimony introduced at the hearing and to remand to the ALJ as may be necessary for further development of the record. [Slip op. at 11-12.]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. Having accepted the court's remand, we regard its opinion as the law of the case. In accord with the court's opinion, we shall remand this case to the judge for a hearing and supplemental decision on the issue of the appropriate remedy for Febus and Rosenthal.

ORDER

It is ordered that this proceeding is remanded to the Regional Director for Region 34 for further appropriate action including the holding of a hearing before Administrative Law Judge Stephen J. Gross should the judge deem it necessary on the issue of an appropriate remedy for the unlawful refusal to recall security guards Orlando Febus and Hector Rosenthal from layoff. The judge shall prepare and serve on the parties a supplemental decision containing findings of fact, conclusions of law, and a recommended Order regarding the issue on remand. Following service of the supplemental decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall apply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to hire applicants for employment because of their activity on behalf of Local No. 275, International Brotherhood of Electrical Workers, AFL-CIO.

WE WILL NOT fail and refuse to reinstate unfair labor practice strikers who have made unconditional offers to return to work.

WE WILL NOT threaten applicants for employment that we will shut down the facility before we will let a union in.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer James Leenhouts and Daniel Bruesch the jobs they applied for and WE WILL offer Paul Fryling full reinstatement to his former job or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make James Leenhouts, Daniel Bruesch, and Paul Fryling whole for any loss of earnings and other benefits resulting from our refusal to hire and refusal to reinstate, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the refusal to hire James Leenhouts and Daniel Bruesch and refusal to reinstate Paul Fryling, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the referrals will not be used against them, in any way.

TEC ELECTRIC, INC.

Thomas W. Doerr, Esq., for the General Counsel.
Kevin M. McCarthy and James B. Thelen, Esqs. (Miller, Canfield, Paddock & Stone, P.L.C.), of Kalamazoo, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. On August 4 and September 22, 1995, the charge and amended charge, respectively, in Case 7-CA-37522 were filed. On December 14, 1995, the charge in Case 7-CA-37980 was filed and on January 31, 1996, the charge was filed in Case 7-CA-38107. All the charges were filed by Local No. 275, International Brotherhood of Electrical Workers, AFL-CIO (the Union), against TEC Electric, Inc. (the Respondent).

On March 5, 1996, the National Labor Relations Board, by the Regional Director for Region 7, issued a second amended consolidated complaint (complaint), which alleges that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), when it unlawfully refused to hire two applicants for employment, when it unlawfully failed to reinstate two unfair labor practice strikers, and when it unlawfully threatened and interrogated employees.

Respondent filed an answer in which it denied that it violated the Act in any way.

A hearing was held before me in Grand Rapids, Michigan, on June 18 and 19, 1996.

On the entire record in this case, to include posthearing briefs filed by the General Counsel and Respondent, and on by observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material the Respondent, a corporation with an office and place of business in Owosso, Michigan, a jobsite located in Norton Shores, Michigan, and various other jobsites located within the State of Michigan, has been engaged as an electrical contractor in the construction industry.

Respondent admits, and I find, that at all material times Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Overview

Respondent is a nonunion electrical contractor and at all times material to this case was working at the Lakeshore Marketplace jobsite, i.e., a mall, located at Norton Shores, Michigan.

The complaint alleges that Respondent violated the Act in several ways which will be addressed below.

B. The Failure and Refusal to Hire James Leenhouts and Daniel Bruesch

Respondent had placed ads in the newspaper advertising jobs for electricians to work for it at the jobsite in Norton Shores, Michigan.

On Thursday, July 27, 1995, union electricians James Leenhouts and Daniel Bruesch applied for employment with Respondent. The person who interviewed them was Supervisor Keith Deters. Deters is admitted by Respondent to be both a supervisor and agent of Respondent within the meaning of Section 2(11) and (13) of the Act. Suffice it to say Respondent made an offer of employment to both applicants to begin work, as journeymen electricians, the following Monday and then withdrew the offer when he ascertained that applicant James Leenhouts intended to organize Respondent's employees. I found both Leenhouts and Bruesch to be very credible witnesses.

Leenhout's version of what was said is as follows:

[Deters] told us to be to work Monday morning I asked him if the wages were all right, and he kind of turned and picked up the application, looked at it, and said, "Yeah, that's fine. That's fine."

Q. And after you talked about wages, did you have any further discussion with Mr. Deters?

A. Yeah. We—we—more discussion of the jobs and I just assumed that, from what he had said, I asked him again, "You want us here Monday morning?" And he said, "Yeah. Be here Monday morning." I said—I asked him what time and he said "7 a.m." So I assumed that we were hired. And so I thanked him and I reached down to shake his hand and we shook hands, I believe. And he hadn't really looked at the applications that close, and I—I had written down there that I was presently employed by Local 275 as a union organizer.

And I just told him, "Keith," I said, "I want you to know up front that while I'm out here doing work for you that I'm going"—"I'm a union organizer, and I'm going to be attempting to organize the people who are working for you under the IBEW." And—

Q. What was Mr. Deters, if anything, was Mr. Deters response to that?

A. Well, he—he immediately said, "Well, I don't"—"I don't need that shit. If that's the case, then I don't need you."

Q. And what, if anything, did you say after he said that?

A. I asked him, I said, "Well, does that mean you don't want us to come in Monday morning then?" And he said, "That's right." He said, "I don't need that on my job."

He said, "If you want to talk to my people, you can talk to them at their homes or at night." And my reply was that, "Well, you know, I'm a qualified journeyman electrician. I'm applying for work with you because of the skills I have." I said, "My organizing activities will not interfere with the work I do for you or interfere with anybody else's work that I do." And he said he didn't care. He said, "I don't need that."

At that time, I—we started to walk out of the trailer, and I believe—I believe that Mr. Bruesch walked out the door and I followed him, and Keith followed us out. And I was still attempting to talk to Keith, and I told him I know the problem you're having here finding qualified people to do this work. And I asked him, you know, "Why don't you come down to the union hall and talk to my business agent?" I said, "We've got people available, people that can do the work for you that are licensed journeymen and apprentices." And his reply—I said, "Come down and talk to the business agent and talk about signing an agreement with us, we can supply you with the people you need."

Q. And what did he say when you told him that?

A. He said that will never happen. He says they'll close the doors before they go union (Tr. 16-18).

Bruesch's version of what was said corroborates Leenhouts and was as follows:

[Deters] said he needed to get rid of three guys that he had working for him, which I thought was kind of comical. He said that three of them were kind of slower than the second coming of Christ, and that he needed to get rid of them. That he was having a hard time finding good journeymen to come out there and do the job.

Q. And do you recall what was said at that point in the conversation then?

A. At that point, he say—Jim [Leenhouts] asked again, he says that, "You want us to come into work Monday?" And he says, "Yeah, figure on Monday."

At that point, Jim says, "I want you to know," he says, "I'm a union organizer and I will be talking to—the men out there about—about the union."

And Keith replied, he says, "I don't care. Call them up on the phone at home. Go to their house, whatever. I don't care what you do on your own time."

And Jim replied, "Well, I'm going to talk to them during break times and lunch breaks." And Keith replied, "Well, why don't you just forget about it. I don't need that shit around here."

Q. And what was said at that point? Do you recall?

A. And Jim asked him again, he says, "Does that mean you don't want us to show up for work Monday?" And Keith replied, "No. Just forget it. I don't need that stuff around here."

Q. Did Jim make any response to that?

A. Jim made the response—he says, "Well, hey, if you have such a hard time, you know, finding good electricians, why don't you come down to the—to the union and talk to us." He says, "We can get all the men you need to complete this job."

And Keith replied, he says it will be a—"They'll shut this job down before it will go union." And at that point, I started for the door cause I figured that he no longer wanted us.

When I left, I stood by the door for a minute waiting on Jim, and he was still talking to Keith (Tr. 63-64).

Keith Deters' version of what was said differs from what Leenhouts and Bruesch testified he said. According to Deters

he did not withdraw the offers of employment and claims he didn't know if Leenhouts and Bruesch would show up for work on Monday or not. He denies that he said that Respondent would shut down before it went union. Thirteen or so journeymen electricians were later hired on the job. See General Counsel's Exhibit 5.

I find that Leenhouts and Bruesch were bona fide applicants for employment and protected by the Act even though Leenhouts was a paid union organizer. See *NLRB v. Town & Country Electric*, 116 S.Ct. 450 (1995). I credit the testimony of Leenhouts and Bruesch and, accordingly, find that Respondent violated Section 8(a)(1) and (3) of the Act when it refused employment to Leenhouts and Bruesch because of Leenhouts's expressed intention to engage in protected union activity.

In addition, Respondent violated Section 8(a)(1) of the Act when Deters threatened that Respondent would shut down before it went union.

C. Failure to Reinstate Paul Fryling and Mark Stafford

Paul Fryling and Mark Stafford are both members of the Union and were hired as journeymen electricians by Respondent on July 31 and August 1, 1995, respectively.

On August 25, 1995, Fryling and Stafford went out on an unfair labor practice strike to protest the failure and refusal of Respondent to hire James Leenhouts and Daniel Bruesch back on July 27, 1995. I find it was an unfair labor practice strike because:

(1) As noted in section III,B, above, the failure and refusal to hire Leenhouts and Bruesch was an unfair labor practice because the refusal to hire was based on Leenhouts's expressed intent to try to organize Respondent's employees;

(2) Leenhouts, Fryling, Stafford, and Union Business Manager George Robinson all credibly testified that Fryling and Stafford went on strike to protest Respondent's unfair labor practices;

(3) Fryling and Stafford told Grant Williams, who was authorized, according to Respondent, to receive such information, that they were going on an unfair labor practice strike;

(4) For several hours on August 25, 1995, Fryling, Stafford, and Union Business Manager George Robinson walked a picket line carrying picket signs which stated as follows: "TEC Electric Violates Federal Law" and "TEC Electric Unfair Labor Practices Local 275 IBEW"; and

(5) Business Manager George Robinson on August 25, 1995, told Bob Miller, the job superintendent for SASCON, the general contractor on the project, that the Union was on an unfair labor practice strike to protest the failure to hire Leenhouts and Bruesch, and picketing at the jobsite continued, but without Fryling and Stafford, for another 3 weeks beyond August 25, 1995.

When an unfair labor practice striker makes an unconditional offer to return to work he or she is entitled to reinstatement even if the employer has to fire a permanent replacement. See, e.g., *Harowe Servo Controls*, 250 NLRB 958, 961 (1980).

On October 23, 1995, Fryling made an unconditional offer to return to work. Deters called Fryling on the phone and left a message that there was no work and he couldn't use Fryling because the job was winding down and he was letting people go.

Suffice it to say after Fryling went on strike on August 25, 1995, no less than four journeymen electricians, i.e., Ray Carruthers, Paul Karosas, Mark Butzow, and Alan Hulbert, were hired and all were kept on the payroll after Fryling's unconditional offer to return to work. Since Fryling and Stafford were hired as journeyman electricians, it appears that four journeymen electricians were hired as replacements for Fryling and Stafford. It was a violation of Section 8(a)(1) and (3) of the Act to fail to reinstate Fryling to his former position because unfair labor practice strikers are entitled to reinstatement upon their unconditional offer to return to work even if they have been replaced.

Stafford made an unconditional offer to return to work on January 23, 1996. While the same number of individuals were hired as journeymen after Stafford went on strike as were hired by Respondent after Fryling went on strike none of those journeymen replacements were still working when Stafford made his unconditional offer to return to work. Accordingly, Respondent, when it told Stafford they were not reinstating him for lack of work this was a complete defense.

Respondent did not violate the Act when it failed to reinstate Stafford on his unconditional offer to return to work because there was no job available either unfilled or filled with a replacement hired after Stafford went on strike.

D. Alleged Miscellaneous 8(a)(1) Violations by Keith Deters and Marcia Blanchard

Shortly after Mark Stafford wore a union T-shirt to work one day Supervisor Keith Deters told him that if his work did not pick up that there would be new faces on the job.

Deters admits he said this to Stafford but claims he said it to both Stafford and another union journeyman electrician John Hook and that he said it because Stafford and Hook were slow in getting a particular job done and not because Stafford wore a union T-shirt on the job. I credit Deters' testimony as to his motivation in saying what he said. I note that a finder of fact with the advantage of personal observation of witnesses can accept some testimony of a witness on one issue but find that same witness less than credible on another issue. In point of fact Deters never fired or otherwise disciplined Stafford. I also credit Deters' testimony that he knew for some time that Stafford was union-affiliated and with respect to John Hooks I note that he remained in Respondent's employ until his untimely death by foul play in January 1996. Stafford, I note, remained in Respondent's employ until he went on strike on August 25, 1995.

I credit Mike Hubbell that when he applied for a job with Respondent shortly after Leenhouts and Bruesch had been refused employment he asked if the job was union and receptionist Marcia Blanchard said that Deters had recently run off some union people. However, I do not find this to be an 8(a)(1) statement because Blanchard, who is no longer in Respondent's employ, was charged with merely giving out applications to be filled out by applicants and accepting back completed applications. She gave Hubbell an application and he filled it out and returned it to her. There is no evidence that Blanchard's authority in the hiring process was any more than carrying out the ministerial duties mentioned above and, therefore, she lacked authority to bind Respondent with the statement she made to Hubbell. She is neither a supervisor nor an agent within the meaning of the Act.

REMEDY

The remedy in this case should include a cease and desist order, the posting of an appropriate notice, the offering of employment and backpay to James Leenhouts and Daniel Bruesch, and an offer of reinstatement and backpay to Paul Fryling. With respect to reinstatement if the job at Norton Shores has been completed offers of jobs should be made at new worksites of Respondent if it is determined during compliance that Respondent has a history of hiring for new jobs employees who had worked for it in the past. See *BE & K Construction Co.*, 321 NLRB 561 (1996).

CONCLUSIONS OF LAW

1. TEC Electric, Inc., the Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Local No. 275, International Brotherhood of Electrical Workers, AFL-CIO, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent on July 27, 1995, violated Section 8(a)(1) and (3) of the Act when it failed and refused to hire James Leenhouts and Daniel Bruesch because of Leenhout's expressed intent to try to organize Respondent's employees.

4. Respondent on and after October 23, 1995, violated Section 8(a)(1) and (3) of the Act when it failed and refused to reinstate Paul Fryling, an unfair labor practice striker, after he made an unconditional offer to return to work.

5. Respondent violated Section 8(a)(1) of the Act when it threatened applicants for employment that Respondent would shut down before it let a union in.

6. The unfair labor practices found above are unfair labor practices having an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]